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9 *Committee*

Honorable Christopher M. Alston
Chapter 11
Hearing Date: December 7, 2018
Hearing Time: 9:30 a.m.
Response Date: November 30, 2018

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

10 In re:) No. 16-11767-CMA
11 NORTHWEST TERRITORIAL MINT, LLC,)
12 Debtor.)
13) RESPONSE OF COUNSEL FOR THE
14) OFFICIAL UNSECURED CREDITORS'
15) COMMITTEE TO FEE APPLICATIONS OF
16) TRUSTEE AND TRUSTEE'S
17) PROFESSIONALS

18 Miller Nash Graham & Dunn, LLP, and Mark D. Northrup, counsel for the Official
19 Unsecured Creditors' Committee (the "Committee") in this case, hereby respond as follows to the
20 following fee applications and related supporting documents filed by Mark Calvert, as Chapter 11
21 Trustee (the "Trustee"), Cascade Capital Group LLC (the "Trustee's Accountants"), and K&L Gates
22 LLP (the "Trustee's Counsel") (the Trustee's Accountants and Trustee's Counsel are collectively
23 referred to herein as the "Trustee's Professionals"): the Trustee's First Application for
24 Compensation (Dkt. #1926; the "Trustee's Application"); the Declaration of Mark Calvert in
25 Support of Trustee's First Application for Compensation (Dkt. #1927; the "Trustee's Declaration");
26 the First Application for Compensation of Cascade Capital Group LLC as Accountants for the
Chapter 11 Trustee (Dkt. #1924; the "Cascade Application"); the Declaration of Mark Calvert in
Support of the First Application for Compensation of Cascade Capital Group LLC as Accountants

RESPONSE OF COUNSEL FOR THE OFFICIAL
UNSECURED CREDITORS' COMMITTEE TO FEE
APPLICATIONS OF TRUSTEE AND TRUSTEE'S
PROFESSIONALS-- 1
No. 16-11767-CMA4820-4173-9905.1

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1 for the Chapter 11 Trustee (Dkt. #1925; the “Cascade Declaration”); K&L Gates LLP Application
2 for Compensation (Dkt. #1928; the “K&L Gates Application”); and the Declaration of Michael
3 Gearin in Support of the K&L Gates LLP Application for Compensation (Dkt. #1929; the “Gearin
4 Declaration”):

5 **I. Introduction**

6
7 Both the Trustee and the Trustee’s Counsel acknowledge that “this case is administratively
8 insolvent by a large margin.” Gearin Declaration at p. 4 (Dkt. #1929). The Trustee testifies that the
9 estate currently contains: \$2,389,183 in cash; accounts receivable in the amount of \$79,185; and
10 store inventory with a book value of \$354,624. Trustee’s Application at p. 14. As filed, the
11 Trustee’s Application (\$909,799.30) and the Applications of Trustee’s Counsel (\$3,253,536.74) and
12 Cascade (\$953,889.20) alone total \$5,117,225.24. In addition, Committee counsel has separately
13 submitted its own fee application in the amount of \$384,137.00 (Dkt. #1931) and there remain eight
14 other allowed, unpaid administrative creditor claims totaling approximately \$250,000. Trustee’s
15 Application at p. 14. Based on these numbers, the estate is thus administratively insolvent in the
16 amount of \$2,928,370.
17

18
19 These facts bear witness to the grim realities of this case. First and foremost, they confirm
20 that general unsecured creditors of this Debtor will receive no recovery on their claims. This is a
21 devastating blow to the hopes of the 3,000+ creditors who have submitted proofs of claim in this
22 case.

23
24 Second, this reality suggests a potential threshold issue of standing. Bankruptcy Code
25 §1109(b) provides that unsecured creditors’ committees have the right to appear and be heard on
26 “any issue in a case under this chapter.” Some cases, however, have read into §1109 a “standing”

requirement that demands that the party in interest seeking to appear have “a sufficient stake in the
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proceeding so as to require representation.” *In re Global Industrial Technologies, Inc.*, 645 F.3d 201, 210 (3rd Cir. 2011). Here, the Committee’s members and its constituent body of all general unsecured creditors arguably have no “stake in the [fee application] proceeding,” since there will be no distribution on their claims. Regardless, the law firm of Committee counsel certainly has a “stake” in the fee application process, since estate funds are ostensibly available for the fractional payment of administrative claims.

II. Response

As the Local Bankruptcy Rules require, the Trustee Declaration and the Cascade Declaration, both submitted by Mark Calvert in his two separate capacities as Trustee, on the one hand, and principal of Cascade, on the other, identify professional services performed in a number of task categories. The Gearin Declaration presents its time entries similarly sorted into specific work categories. Committee counsel has examined in detail the Trustee Applications and supporting Declarations and registers, without limitation, the following concerns with the Court:

A. The Trustee’s Application

1.) The Statutory Predicate

Bankruptcy Code §330 provides:

§330. Compensation of Officers

(a)(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103 –

(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person; and

(B) reimbursement for actual, necessary expenses.

(2) The court may, on its own motion or on the motion of the United State Trustee, the United States Trustee for the District or Region, the trustee for the estate, or any other party in interest, award compensation that is less than the amount of compensation that is requested.

(3) In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including –

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

(4)(A) Except as provided in subparagraph (B), the court shall not allow compensation for –

(i) unnecessary duplication of services; or

(ii) services that were not –

(I) reasonably likely to benefit the debtor's estate;
or

(II) necessary to the administration of the case.

1
2
3 (7) In determining the amount of reasonable compensation
4 to be awarded to a trustee, the court shall treat such compensation
5 as a commission, based on section 326.

6
7 Under this structure, once a court has determined “reasonable compensation” according to
8 the §330(a) criteria, a trustee’s fees will be reduced, if necessary, to the statutory maximum
9 calculated under §326(a). *See, e.g., In re Financial Corp. of America*, 114 B.R. 221, 224 (9th Cir.
10 BAP 1990) (“Trustee fees should be set according to Section 330 criteria, not merely according to
11 the amount of moneys disbursed...The limits in [Section 326(a)]...are to be applied as outer limits,
12 and not as grants or entitlements to the maximum fees specified.”). In his Application, the Trustee
13 seeks payment of \$906,310 in fees pursuant to the formula set forth in Bankruptcy Code §326(a),
14 based on his distribution of \$29,435,335 in estate funds during the period from April 11, 2016
15 through October 31, 2018.¹

16 The basic guidelines for courts’ application of §330(a) to the determination of
17 “reasonable compensation” are well known:

18 • In order to arrive at a determination of a reasonable fee allowance, bankruptcy courts
19 must “examine the circumstances and manner in which the professional services were performed
20 and the results achieved.” *In re Garcia*, 335 B.R. 717, 724 (9th Cir. BAP 2005).

21 • A bankruptcy court has “considerable discretion in determining whether to disallow
22 all, part, or none of the fees and expenses of a properly employed professional.” *In re Triple
23 Star Welding, Inc.*, 324 B.R. 778, 789 (9th Cir. BAP 2005). In addition, if a court finds that
24 services performed were “necessary” but not “reasonable,” it may unilaterally reduce an
25 applicant’s “excessive” hourly rate and the number of hours for which the applicant seeks
26

¹ Exhibit A to the Trustee Declaration contains the Trustee’s time entries and fees allocated to each. Exhibit A thus constitutes, in essence, a standard “lodestar” fee application that produces a total fee claim of \$1,020,365.00. Since this amount exceeds the §326(a) cap amount of \$906,310, the cap amount serves, as a threshold matter, to limit any lodestar award.

1 compensation. *Unsecured Creditors Committee v. Puget Sound Plywood, Inc.*, 924 F.2d 955,
2 961 (9th Cir. 1991).

3 • In cases in which the §326(a) fee cap applies, courts have also acknowledged the
4 effect of “extraordinary circumstances” as a basis for reducing trustee fees beneath the calculated
5 cap amount. Such cases may, however, apply only to Chapter 7 trustees, not to Chapter 11
6 trustees. *See, e.g., In re Salgado-Nava*, 473 B.R. 911 (9th Cir. BAP 2012); *In re Scoggins*, 517
7 B.R. 206 (Bankr. E.D. Cal. 2014).

8 **2.) Creditor Reaction**

9 “Taking into account all relevant factors,” is the Trustee’s fee request of \$906,310
10 “reasonable” for purposes of determination under Bankruptcy Code §330?

11 As the Court is aware, this has been a very difficult case. The Chapter 11 reorganization
12 of the Mint’s business operations—which was the only path through which unsecured creditors
13 would recover anything—failed; the estate is administratively insolvent by millions of dollars;
14 and the Court has publicly expressed its displeasure with more than a few actions (or events) that
15 have taken place during the Trustee’s administration of the case. Under these circumstances, it
16 is not surprising that members of the Committee have expressed strong personal views of the
17 Trustee’s conduct.

18 On November 1, 2018, Committee members Paula and Richard Pehl filed with the court
19 their “Request for Redress of Grievances for Defalcations against the Estate” (Dkt. #1901; the
20 “Pehl Submission”). Extending for 70 pages, the Pehl Submission sharply criticizes the Trustee
21 on multiple grounds. For example: “By failing to disclose all estate assets, the Trustee created
22 the environment that facilitated defalcations against the estate.” Submission, p. 7. The Trustee’s
23 administration of the China dies and business was characterized by a “lack of accounting
24 precision” and an “almost perverse insistence on being vague.” Submission, p. 8. With respect
25 to the Mint’s Pentagon operation, “the Trustee did not act to protect NWTM’s IP property,
26 including its phone numbers; he did not act to protect NWTM’s trademarks; he did not act to

1 protect NWTM's licenses; he did not preserve NWTM's domains. This is gross negligence."
2 Submission, p. 26. "Not positioning a competent production manager to restore the productivity
3 of Medallic as a mint was a fateful and irreversible decision that left the company in the hands of
4 people who were either not competent or who had a vested interest in crashing it." Submission,
5 p. 39.

6 On November 21, 2018, David James, a Co-Chair of the Committee, also requested that
7 Committee counsel submit to the Court his (following) email (originally sent to Committee
8 counsel):

9 I do feel compelled to respond to the court about payment
10 to Calvert and his company. As I stated before, I have no problem
11 with your fees but want to contest Calvert and his Capital group
12 receiving any payment whatsoever, since he, in all our unsecured
13 creditors' views, failed to do anything he stated he could and
14 would do. Incompetent and unprofessional in every aspect of his
15 operation, attitude, procedures. His forensic accounting skills
16 were non-existent. Based upon his presentation and statements
17 about his expertise, he demonstrated that he did not possess any of
18 the attributes of forensic accounting, data mining, cluster analysis
19 or applied mathematics. Skills needed to follow the money and
20 that he stated he had. No matter how much I tried to help him do
21 his job he rebuked my offer and skills in exactly what he
22 proclaimed he possessed when he was named Trustee by Mr.
23 Martin Smith. With my over 35 years' experience in doing exactly
24 what he said he could do and his job description, which demanded
25 that he could do, he was not interested in listening to me or anyone
26 else concerning accomplishing his anointed and accepted task as
Trustee. His ego, misguided sense of professionalism, plus his
unending attempt to appear as F. Lee Bailey or Johnny Cochran
resulted in his squandering the entire assets of what was left in the
estate while never accomplishing the most basic of his required
tasks: that of finding the money or where it went. His accountant
skills were flawed at best resulting in continued errors in monthly,
quarterly, and interim reports. He demonstrated time and time
again that he had no idea of superior accounting skills, or forensic
accounting.

25 It is fundamental that a Chapter 11 trustee is empowered to administer a bankruptcy case in
26 accordance with his business judgment. *See, e.g., In re Consolidated Auto Recyclers, Inc.*, 123 B.R.

1 130, 140 (Bankr. D. Me. 1991) (“So long as a trustee conducts the affairs of the estate by exercising
2 his business judgment in good faith, upon a reasonable basis, and within the scope of his authority
3 under the Code, he may proceed without interference.”); also citing *Bennett v. Williams*, 892 F.2d
4 822, 824 (9th Cir. 1989) (deference to business management decisions of bankruptcy trustee).
5 Committee counsel is confident that the Court will take whatever actions it deems necessary to
6 afford the Trustee an opportunity to respond to the foregoing allegations and also to establish the
7 extent to which the Trustee’s exercise of his business judgment was appropriate, despite the
8 Trustee’s failure to reorganize the Debtor’s business.

10 Committee counsel is also confident that the Court will properly assess such creditor
11 comments in its examination, for Trustee fee award purposes, of the totality of “the
12 circumstances and manner in which the professional services were performed and the results
13 achieved.” With respect to this “results achieved” factor, Committee counsel notes the following
14 excerpt from *In re Stoecker*, 118 B.R. 596, 605-6 (Bankr. N.D. Ill. 1990), in which the court
15 addressed a trustee’s §326(a) fee application in a similarly failed Chapter 11:

18 [T]his case remains a failed Chapter 11 reorganization.
19 Dividends were not paid to unsecured creditors and the several
20 businesses of the Debtor have not been successfully
21 reorganized...[T]he underlying goals of Chapter 11 have not been
22 achieved. Maximum results justify maximum compensation. Lesser results should produce lesser allowed compensation...The
23 Court does not view it an injustice or unduly parsimonious to
24 award the Trustee less than the maximum [§326(a)] amount
25 because the Trustee did not obtain the maximum results.²

26 **3. Additional Committee Counsel Concerns**

² In *Stoecker*, the court concluded that the trustee “had done a commendable job” but reduced the trustee’s fee award by approximately 17%.

1 **a.) Investigation-Fraud.** The Trustee Declaration (Dkt. #1927-2, Ex. B-3) identifies
2 \$14,065.00 in services performed in the category of “Investigation-FBI/US Trustee Office.”
3 Committee counsel is concerned that such services may have provided a substantial benefit to the
4 FBI, which investigated Mr. Hansen and Ms. Erdmann for many months, but has provided no
5 economic benefit to the bankruptcy estate or its creditors. Should it come to pass, the criminal
6 conviction of Mr. Hansen and/or Ms. Erdmann—now awaiting trial—is not likely to provide any
7 tangible return or benefit to creditors.
8

9 **b.) Plan of Reorganization & Disclosure Statement.** The Calvert Declaration (Dkt.
10 #1927-2, Ex. B-3) identifies \$62,720.00 for services performed in the category of “Plan of
11 Reorganization & Disclosure Statement.” In the absence of a reorganization, this work provided no
12 benefit to the estate.
13

14 **B. The Cascade Application**

15 Bankruptcy Code §328(b) provides:

16 (b) If the court has authorized a trustee to serve as an attorney or
17 accountant for the estate under section 327(d) of this title, the court
18 may allow compensation for the trustee’s services as such attorney or
19 accountant only to the extent that the trustee performed services as an
20 attorney or accountant for the estate and not for performance of any
21 of the trustee’s duties that are generally performed by a trustee
22 without the assistance of an attorney or accountant for the estate.

23 Here, the Court authorized the Trustee to employ his affiliated entity, Cascade Capital Group
24 LLC, as accountants for the Trustee/estate. As filed, the Cascade Application seeks allowance of
25 \$926,742.20 in fees and \$27,147.00 in expense reimbursements.

26 Section 328(b) is not intended to provide the trustee with a windfall by permitting
compensation twice for the same services. Section 328(b) also is not an exception to the limitations

on trustees' compensation established in §326. Under §328(b), the court may allow compensation to a trustee who has been authorized to serve as an attorney or accountant for the estate "only to the extent that the trustee performed services as attorney or accountant" and "not for performance of any of the trustee's duties that are generally performed by a trustee." 3 *Collier on Bankruptcy* at ¶ 328.04(1), p. 328-34 (16th ed.). The trustee whose records fail to distinguish between activities as trustee and activities as attorney or accountant for a trustee risks forfeiture of trustee compensation as well as denial or disgorgement of such professional fees. *Id.* at p. 328-35. *See, e.g., In re McKenna*, 93 B.R. 238, 240 (Bankr. E.D. Cal. 1988) (Trustee has the burden of proof to "demonstrate that services for which a trustee wants [professional fees under §327(d)] were not duties that generally are performed by a trustee without assistance of [the §327(d) professional].")

1.) Overview/Analysis

The Cascade Declaration (Dkt. #1925-2 at p. 4) identifies multiple categories of work performed by Cascade personnel: "Investigation-FBI/US Trustee Office" (\$52,484.00); "Investigation" (\$36,271.00); "Investigation-American Express" (\$31,962.50); "Investigation-Diane/Ross" (\$27,254.20); "Investigation-Discovery" (\$9,188.00); "Investigation-Storage Inventory/Vault" (\$88,644.40; "Inventory" (\$126,737.20); "Bank Database" (\$103,010.00); "Accounting" (\$90,505.40); "Insolvency" (\$78,176.20); "Medallic" (\$55,184.4); "Bankruptcy Administration" (\$37,455.00); "Plan of Reorganization & Disclosure Statement" (\$36,965.00); "Operations" (\$36,014.60); "Claims" (\$34,127.20); "MORs" (\$27,469.40); "Cash Flow" (\$25,146.5); "Committee" (\$20,475.00); "BK Schedule" (\$23,820.00); "Liquidation Analysis" (\$14,635.00); "Court Hearing" (\$13,575.00); "Close of Company" (\$10,863.70); "Job Costing" (\$9,470.00); "Sale of Assets" (\$6,688.80); "DIP" (\$4,166.00); "Travel" (\$3,432.90); "Sale of Company" (\$2,800.00).

1 Other than the "Accounting" task code, which accounts for \$90,505.40 of the \$926,742.20 in
2 total fees requested, and perhaps the "Bank Database" task code, which accounts for \$103,010.00 in
3 requested fees, it is difficult to determine whether any of the other work categories describe work
4 that could not be "generally performed by a trustee without the assistance of an attorney or
5 accountant for the estate." Why is it appropriate to pay Cascade personnel amounts in excess of the
6 Trustee's §326(a) cap for performing work that appears to be typical of all Chapter 11 bankruptcy
7 proceedings and that does not appear to require the special expertise of a licensed accountant?
8 Which of Cascade's work categories does the Trustee contend qualify for payment above and
9 beyond the Trustee's §326(a) cap? Other than providing the raw time entries, the Cascade
10 Application does not address this issue.
11

12 The Cascade Application and the Cascade Declaration further identify (and seek allowance
13 of) a total of \$205,065.00 in services performed by the Trustee, not as Trustee but in his personal
14 capacity as an accountant/principal of Cascade Capital Group, LLC. These fees are allocated to a
15 number of work categories: "Inventory"; "Investigation"; "Investigation-Storage Inventory/Vault";
16 "Medallic"; "Bank Database"; "Bankruptcy Admin"; "Investigation-Diane/Ross"; "Investigation-
17 FBI/US Trustee Office"; "Committee"; "Court Hearing"; "Investigation-American Express"; "Sale
18 of Assets"; "Insolvency"; "Investigation-Discovery"; "Accounting"; "Plan of Reorganization &
19 Disclosure Statement"; "Liquidation Analysis"; "Operations." Again, with the exception of the
20 limited tasks performed by the Trustee on "Accounting" (2 hours/\$700.00) and perhaps on the
21 "Bank Database" (21.3 hours/\$7,525.00), the vast bulk of these work categories do not appear to
22 describe "accounting" tasks or to require an accountant's professional expertise.
23
24
25

26 Under these circumstances, it is appropriate for the Court to request an answer to the
following question: What services personally performed by the Trustee and Cascade personnel are

properly allocable to the Trustee Application as opposed to the Cascade Application; and what services, if any, performed by the Trustee and Cascade personnel should be deemed traditional “trustee duties” as opposed to professional accounting services and so be limited by the §326 cap? *See, e.g., In re Berglund Construction Co., Inc.*, 142 B.R. 947, 949 (Bankr. E.D. Wash. 1992) (“Neither professionals nor paraprofessionals may be separately compensated for performing trustee duties beyond the limits of §326.”). From the outset, the Committee has harbored concerns about the need to scrutinize the services performed by Cascade Capital Group, LLC, the services performed by the Trustee, and the interplay between these services, Bankruptcy Code §§326, 328, and 330.

2. Additional Committee Counsel Concerns

Investigation-Fraud. The Cascade Declaration (Dkt. #1925-2, Ex. B-3) identifies a total of \$52,484.00 in services performed in the category of “Investigation-FBI/US Trustee Office.” Committee counsel is concerned that such services may have provided a substantial benefit to the FBI, which investigated Mr. Hansen and Ms. Erdmann for many months, but have provided no economic benefit to the bankruptcy estate or its creditors. Again, the criminal conviction of Mr. Hansen and/or Ms. Erdmann is not likely to provide any tangible return or benefit to creditors.

Staff Compensation. The Cascade Declaration seeks compensation for two Cascade “staff” employees who are apparently not trained accountants: Marjorie Chappel and Jessica Gilmore. Dkt. #1925 at p. 3. Requested fees for these individuals total \$190,890.75 (\$12,045.00 and \$178,845.75, respectively). Even if Ms. Chappel and Ms. Gilmore are designated as “paraprofessional persons” under §330(a)(1)(A), this compensation should fall under the Trustee’s cap amount. In *In re Jenkins*, 130 F.3d 1335, 1342 (9th Cir. 1997), the court ruled that “a trustee may receive total

1 compensation in excess of the §326(a) limit only where the paraprofessional has been employed
2 under §327 *and the services performed by the paraprofessional require expertise beyond that*
3 *expected of an ordinary trustee.*” [Emphasis added]]. Here, there is no evidence that the services
4 performed by Ms. Chappel and Ms. Gilmore required or provided “expertise beyond that expected
5 of an ordinary trustee.”
6

7 **C. The K&L Gates Application**

8 **1.) Overview**

9 K&L Gates has provided an enormous amount of legal services to this case and this estate.
10 Without this support and without K&L Gates’ willingness to work “full bore” for two and one-half
11 years with little or no compensation, little positive would likely have been accomplished. Ironically,
12 as a reward for all its work for the Trustee, K&L Gates now finds itself as one of the largest—and
13 most exposed—creditors of this estate, facing the stark reality that much if its \$3.25 million in work
14 will go uncompensated.
15

16 **2.) Committee Counsel Concerns**

17 **a.) Litigation Against Ross Hansen/Diane Erdmann.** The K&L Gates Application
18 includes a number of task categories describing litigation with Hansen/Erdmann. These time
19 expenditures have produced little or no benefit to the estate:
20

21 **Litigation (70100).** The K&L Gates Application (Dkt. #1928 at p. 11) identifies
22 \$115,235.00 worth of legal services performed on general litigation matters, including action taken
23 by the Trustee to address “efforts by Ross Hansen to interfere with the administration of the estate.”
24 The Trustee addressed these “efforts” through a Motion for Order Holding Ross Hansen in
25
26

1 Contempt for Violation of the Automatic Stay (Dkt. #460). The Court denied the Trustee's Motion
2 and the Trustee elected not to pursue the Motion further.

3 **Trustee v. Diane Erdmann (70102).** The K&L Gates Application (Dkt. #1928 at
4 pp. 14-15) identifies \$197,724.00 worth of legal services performed in litigation against Diane
5 Erdmann. The litigation described in this task category focused chiefly on Erdmann's entitlement
6 (or not) to funds paid as an advance fee deposit to the Tracy Law Group and related issues. The
7 Trustee's efforts to recover the balance of the Tracy advance fee deposit were unsuccessful, as was
8 the Trustee's appeal of this Court's ruling on Erdmann's entitlement to the funds.

9
10 **American Express Fraudulent Transfer Action (70107).** The K&L Gates
11 Application (Dkt. #1928 at pp. 16-17) identifies \$254,748.00 worth of legal services performed in
12 litigation against Diane Erdmann (Adv. Pro. 16-01217). The litigation described sought to recover
13 in excess of \$1,000,000 from Ms. Erdmann on the theory that Ms. Erdmann used the Debtor's assets
14 to pay credit card charges that benefitted Erdmann personally, not the Debtor. K&L Gates
15 ultimately obtained a judgment against Erdmann in the amount of \$430,000. Throughout this case,
16 however, it has never been evident that Ms. Erdmann has any assets or any ability to satisfy this
17 judgment.
18
19

20 As a general principle, the Committee's concerns about these litigation matters are based on
21 a common sense cost-benefit analysis; and various members of the Committee have been frankly
22 opposed to the Trustee's election to pursue such litigation based on that analysis. The amount of
23 fees potentially recoverable in the Tracy advance fee deposit dispute are/were less than the amount
24 of legal fees and costs it took to pursue (unsuccessfully) their recovery; and the Committee has been
25 concerned from the outset that Diane Erdmann is "judgment proof" and that the Trustee's litigation
26 against her has similarly consumed far more estate assets than the Trustee will ever recover. These

1 cost-benefit analyses may also be applicable to elements of the “**Electronic Discovery Fees and**
2 **Costs (77100)**” task code that appears at p. 19 of the K&L Application, which indicates that a
3 portion of the \$269,937 in identified fees and costs are attributable to “significant electronic
4 discovery services provided in connection with the Erdmann American Express litigation.”
5

6 **b.) Plan of Reorganization & Disclosure Statement.** The K&L Application (Dkt. #1928
7 at p. 17) identifies \$41,571 for services performed in the category of “Plan and Disclosure
8 Statement.” Again, in the absence of a reorganization, this work provided no benefit to the estate.

9
10 **D. Conclusion**

11 Committee counsel acknowledges the Court’s task in addressing the fee applications now
12 before it:

13 Deciding fee applications under the current state of the law is an
14 inherently subjective process made more difficult and time
15 consuming by the wide discretion invested in the court. There is no
16 scientific method or uniform approach to these sensitive matters
17 which are important to the professionals seeking compensation. Fee
18 applications involve a disproportionately undue amount of the
19 resources and time of the courts.

20 *Report of the Federal Courts Study Committee*, Part II §5F, ¶ 1 at 104 (April 2,
21 1990).

22 This has been a difficult case and Committee counsel looks forward to at least the beginning
23 of a resolution of these issues, as the case approaches its conclusion.

24 DATED this 30th day of November, 2018.

25 MILLER NASH GRAHAM & DUNN LLP

26 /s/ Mark D. Northrup

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